81072-9

Supreme Court No. ___
(COA No. 58176-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROGER ENGEL,

Petitioner.

PETITION FOR REVIEW

VANESSA M. LEE
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

Other Authorities

A. IDENTITY OF MOVING PARTY

Petitioner Roger Engel, Petitioner below, respectfully requests this Court accept review of the Court of Appeals' decision on appeal, affirming his conviction for second degree burglary.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Engel seeks review of the Court of Appeal's unpublished decision in State v. Roger Engel, No. 58176-7-I, slip op. (Wash., October 15, 2007).

C. ISSUE PRESENTED FOR REVIEW

To support a conviction for burglary in the second degree, the State had to prove, beyond a reasonable doubt, Mr. Engel entered or remained unlawfully in a building. "Building" is statutorily defined to include any "fenced area." The State alleged Mr. Engel unlawfully entered the yard of the Western Asphalt Company, only one-third of which was enclosed by a fence. Did the resulting burglary conviction violate due process, requiring reversal?

D. STATEMENT OF THE CASE

The facts are stated in the Opening Brief at 3-7 and are incorporated by reference.

1. Argument on Appeal. On appeal, Mr. Engel argued that a yard which is only partially enclosed by a fence cannot be a

"fenced area" and is not a "building" as defined by statute. The State therefore failed to prove an essential element of second degree burglary: that Mr. Engel entered or remained in a "building."

2. Decision By The Court Of Appeals. The Court first ruled that a Confrontation Clause violation, conceded by the State, was harmless error. Slip op. at 4-5.The Court of Appeals then turned to the definition of "fenced area," which it acknowledged is a question of first impression. Slip op. at 7. Although recognizing the Supreme Court has held that a lot with a fence running on only one side is not a fenced area, the Court of Appeals held that "combined natural barriers and man-made fencing create a 'fenced area' in satisfaction of the 'building' element of the second degree burglary requirements." Slip op. at 8.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Mr. Engel requests this Court grant review of his case pursuant to RAP 13.4(b) because it involves an issue of substantial public interest that should be determined by the Supreme Court.

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT ENGEL'S CONVICTION FOR BURGLARY IN THE SECOND DEGREE.

1. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of second degree theft beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

The State alleged Mr. Engel committed burglary in the second degree by entering the yard of Western Asphalt Company and taking aluminum tire rims which had been left outside a shed in order to lure thieves within view of a hidden camera.

To convict Mr. Engel of burglary in the second degree, the State was required to prove that, intended to commit a crime against a person or property therein, Mr. Engel entered or remained unlawfully in a building other than a vehicle or dwelling. RCW 9A.52.030(1). Because it did not prove that the Western Asphalt yard was a "building," the State failed to prove every element of the crime.

2. The Western Asphalt yard was not a "building" as defined by statute because it was not a "fenced area" under the ordinary meaning of the phrase. "Fenced area" is included in the statutory definition of "building." RCW 9A.52.110(5). There is no statutory definition for "fenced area." "Absent a contrary legislative intent, we give a term that is not defined by statute its ordinary meaning." State v. Wentz, 149 Wn.2d 342, 352, 68 P.3d 282 (2003) (finding that ordinary meaning of "fenced area" applied to a residential backyard fully enclosed by a solid wood fence) citing

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P.2d 549 (1992).

Here, the jury was instructed that "building, in addition to its ordinary meaning, includes any fenced area." Instruction No. 7, CP 20. No evidence was presented that Mr. Engle entered or remained in any "building" other than the yard owned by Western Asphalt. However, the yard is only partially fenced. 3/21/06RP 117.

The front and one side of the yard are bound by a chain-link fence topped by barbed wire and a large gate which is locked when the business is closed. 3/21/06RP 118, 130; CP 46-47 (App. B).[1] The fence ends on the side of the property, where the business keeps stock piles of gravel and other raw materials. 3/21/06RP 118. There is no fence here because when the stockpiles are at their largest, they would encroach upon, damage, or even "destroy" the fence. 3/21/06RP 118. The size of these stock piles varies according to the season; they are smallest from January to March. 3/21/06RP 118-19. This incident occurred in January.

[1] State's Exhibits 1-4, color photographs of the Western Asphalt yard, have been supplementally designated. Black and white photocopies of these exhibits are attached as Appendices A-D, respectively.

There is no fence on the rest of the property. Western Asphalt owner William Peterson testified "probably two-thirds of our property" is "encase[d]" by "high" and "sloping banks." 3/21/06RP 130. Mr. Peterson testified that in the unfenced portions of the yard, "the terrain...probably acts as a fence more than anything. "3/21/06RP 130. Mr. Peterson identified State's Exhibit 1 as "the back of our yard, which you can see the banks." CP 46-47 (App. A); 3/21/06RP 131. The photograph shows a large hill with a stock pile in the foreground and a steep cliff on the right side of the frame. The State presented no evidence that this hill or bank was of such a steep grade that it would be impossible, or even difficult, for the average person to walk up or down it. In fact, Mr. Peterson indicated that the Western Asphalt property would be accessible by way of this hill:

> DEFENSE COUNSEL: Do you know what's beyond that hill in the background:
> MR. PETERSON: Residences.
> DEFENSE COUNSEL: If you walk up that hill, can you see into the residential area?
> MR. PETERSON: I would assume so, yeah.

3/21/06RP 161. Apart from Mr. Peterson's conclusory statement that the "terrain ... acts as a fence," no evidence was presented

that the nature of the terrain actually would keep intruders out, or any explanation of how it would do so. 3/21/06RP 119.

Mr. Peterson identified State's Exhibit 2 as the front entrance to the Western Asphalt property, as viewed from inside the property. 3/21/06RP 131. The photograph shows the chain link fence, the gate standing open, and no fence to the left of the gate. App. B. The terrain to the left of the gate is on a gentle incline. App. B. On the inside of the gate, the road forks and leads off to the left. App. B. Mr. Peterson testified this is an "internal road" which leads only to Western Asphalt's aggregate supplier approximately 4-500 feet away. 3/21/06RP 160-61. The supplier is a completely separate business and there is no physical boundary between the two properties. 3/21/06RP 160-61.

The ordinary meaning of "fenced area" contemplates a property enclosed by a fence. The Western Asphalt yard was not so enclosed. A definition of "fenced area" which would include partially fenced properties would clearly be unreasonable, and beg the question: how much fence must a property have before it can be considered "fenced?" As the Court of Appeals noted in its ruling, a lot with a fence running down only one side, separating it from the street, is not "fenced area." Slip op. at 8, citing Wentz,

149 Wn.2d at 356-57 (J. Madsen, concur.). The Western Asphalt yard was only one-third fenced. 3/21/06RP 130.

Nor can the terrain be considered a "fence." The banks and hills in the unfenced sections of the property may have discouraged unauthorized entry, but there was no evidence that they could actually prevent it. Even if the terrain were completely impassable, it still would not be a fence, according to the ordinary and common-sense meaning of the word.

3. This Court should return to the Rhoads "main purpose" test to determine whether a property is a "fenced area."

The problem with the Court of Appeals' ruling is that if the definition of fenced area can include natural barriers, it begs the question: how much of a natural barrier is required? Will the courts determine how steep a bank must be, or how dense a blackberry bush?

Mr. Engel does not argue that a property must be enclosed by an "impenetrable barrier" in order to be considered a fenced area. Slip op. at 8. Indeed, many fences are penetrable.

Instead, Mr. Engel argues for a common sense approach. Before Wentz, Washington courts used the "main purpose" test announced in State v. Roadhs, 71 Wn.2d 705, 430 P.2d 586

(1967) to determine whether a fenced area was a "structure" or "building" subject to the burglary statutes. See, e.g. State v. Gans, 76 Wn. App. 445, 449-52, 886 P.2d 578 (1994), rev. denied, 126 Wn.2d 1020 (1995) (fenced area is a "building" if its main purpose is to protect personal property inside it); State v. Brenner, 53 Wn. App. 367, 377-78, 768 P.2d 509, rev. denied, 112 Wn.2d 1020 (1989) (wrecking yard completely enclosed by 8-foot fence is a "building"); State v. Livengood, 14 Wn. App. 203, 209, 549 P.2d 480 (1975) (under former statute, fence enclosing electrical substation and construction materials was a "structure" serving mainly to protect property).

> Were the fence a mere boundary fence or one erected for the *sole* purpose of esthetic beautification, it would not constitute a "structure" as that term was intended to be interpreted by the legislature. However, where the fence is of such a nature that it is erected mainly for the purpose of protecting property within its confines and is, in fact, an integral part of a closed compound, its function becomes analogous to that of a "building and the fence itself constitutes a "structure" subject to being burglarized.

Id. at 708-09 (emphasis in the original).

The Wentz court held that, since the 1975 amendments explicitly included "fenced area" in the definition of a "building," the Roadhs test was no longer necessary to analyze the purpose of a

fence. Wentz, 149 Wn.2d at 350. Mr. Engel argues the Western Asphalt yard simply does not fall within the ordinary meaning of a "fenced area," but in the alternative, this Court should return to the Roadhs test to analyze the purported barriers. Such an analysis would be appropriate despite Wentz because Wentz did not overturn the Roadhs test, it merely found that analysis obsolete, in light of the 1975 amendments, to determine whether a fenced area is a building. Since the legislature still has not provided insight into the definition of "fenced area," the Roadhs test is the ideal tool to determine whether an area is a fenced area.

Here, the issue is not the fence, but whether the stock piles and terrain, where no fence existed, were mainly intended "for the purpose of protecting property within its confines." Id. There is no evidence that this was the case.

The Court found that the "combined fence and terrain isolate and protect the Western Asphalt yard." Slip op. at 8. However, there was no evidence that the natural barriers were "*deliberately* placed to form a barrier." No witness testified as to the reason why the yard had the layout that it did, or why the stock piles of aggregate were placed where they were. Western Asphalt employee Yvonne O'Leary testified there was no fence near the

stock piles because "the stock piles varied depending on the time of year, and sometimes they would completely bury a fence." 3/21/06RP 118. Therefore, "it wasn't economical to put a fence in there." Id. There was no evidence that the piles obviated the need for a fence, much less that the piles were intended to serve as a fence.

Thus, following the Roadhs test, the main purpose of the stock piles and terrain was not to protect property, and the yard therefore cannot be a fenced area.

4. The "main purpose" test would not undermine the public policy behind the burglary statutes. The Court of Appeals argues the rule proposed by Mr. Engel would undermine the public policy behind the burglary statutes. Slip op. at 8. But if the legislature chooses to clarify the definition of "fenced area," or to include unfenced areas in the burglary statutes, it will do so, and has made similar amendments in the past. The legislative history of the criminal trespass statute is highly instructive. Before July 1979, criminal trespass in the first degree provided:

> A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a *building or* on real property adjacent thereto *or* upon real property which is fenced or

> otherwise enclosed in a manner designed to exclude intruders.

Former RCW 9A.52.070(1) (emphasis added). Criminal trespass in the second degree provided:

> A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon *premises* of another.

Former RCW 9A.52.080(1) (emphasis added).

The statutes now read:

> A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building.

RCW 9A.52.070(1).

> (1) A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

RCW 9A.52.080(1). The statutory definition of "premises" includes "any building, dwelling, structure used for commercial aquaculture, or any real property." RCW 9A.52.010(1).

Analyzing the legislative history behind the 1979 amendments, this Court found the legislature intended to create separate punishments for trespass in a building and trespass in

fenced areas. State v. Brown, 50 Wn.App. 873, 877-78, 751 P.2d 331 (1988).

> The effect of adoption of the amendments contained in these two sections would be to narrow the scope of the gross misdemeanor first degree criminal trespass offense to trespasses in a *building in its ordinary sense*. The reason for the necessity of the odd appearing phrase "other than a fenced area" is because of the definition of "building" in RCW 9A.04.110(5) which includes fenced areas for purposes of using the term "building" elsewhere in the criminal code, in particular in such areas as arson or burglary. Moreover, all other types of trespasses other than in a building would be covered by the second degree criminal trespass offense graded at the misdemeanor level...

Id., quoting House Judiciary Committee Bill Files 307, at 5 (1979) (emphasis in quotation).

Thus, first-degree criminal trespass can be committed only by entering a building "in its ordinary sense," which is clearly not a fenced area. Second-degree criminal trespass can be committed by entering "premises," which include not only fenced areas but also open yards. State v. Mounsey, 31 Wn. App. 511, 518, 643 P.2d 892, rev. denied, 97 Wn.2d 1028 (1982). Most importantly for this case, through the 1979 amendments, the legislature specifically repealed language regarding "adjacent real property " and "fenced" or "enclosed" real property found in former RCW

9A.52.070(1). Brown, 50 Wn. App. at 877. Instead, the legislature focused on the distinction between "buildings" and non-building "premises." Under that scheme, it is clear that whether a piece of property is completely or partially fenced, or not fenced at all, it can be "premises" subject to trespass.

The legislature could have chosen a similar approach with the burglary statute. Instead, it chose the "building" definition in RCW 9A.52.110(5). Unlike the sweeping language of the "premises" definition, which includes "any real property," the "building" definition lists specific items, including "fenced area." In the absence of any indication to the contrary, the ordinary meaning of a fenced area must therefore mean an area enclosed by a fence.

5. Even under the standard put forth in the Court of Appeals' opinion, the State did not carry its burden of proof. The Court held that "[h]ere, the barbed-wire fence and terrain protects the contents of the yard and signals to would-be intruders that the area is not publicly accessible." Slip op. at 8. However, the Court did not explain, and the record does not show exactly how the terrain sends such a message. No testimony or exhibit indicates how the terrain looked from the outside of the yard. In many rural

areas of this state, banks, cliffs, and hills are commonplace sights and send no message whatsoever.

The Court also held that the combination of man-made fence and natural barrier served to "isolate and protect" the Western Asphalt yard. However, this conclusion was not supported by the evidence. There was no testimony that it would actually be difficult for a person to walk down the hill into the yard and the photographs offer no clarity on this point. To the contrary, when defense counsel asked Ms. O'Leary, "If you walk up that hill, can you see into the residential area?," she replied, "I would assume so, yeah," indicating that it *would* be possible to walk up (or, presumably, down) the hill. 3/21/06RP 161. Although Mr. Peterson testified that the terrain "probably acts as a fence more than anything," this vague and conclusory testimony cannot establish the fact that the terrain actually did act as a fence, only that it was more fence-like than nothing.

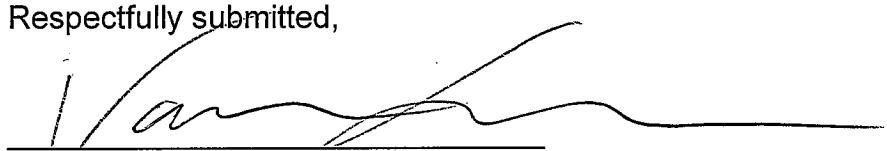
A common sense interpretation of the statute leads to the conclusion that the Court of Appeals erred; the Western Asphalt yard was not a fenced area and therefore not covered by the statutory definition of a "building."

E. CONCLUSION

Because the State failed to prove each element of the crime beyond a reasonable doubt, depriving Mr. Engel of due process, he respectfully asks this Court accept review and reverse the conviction for second degree burglary.

DATED this 19th day of December, 2007.

Respectfully submitted,

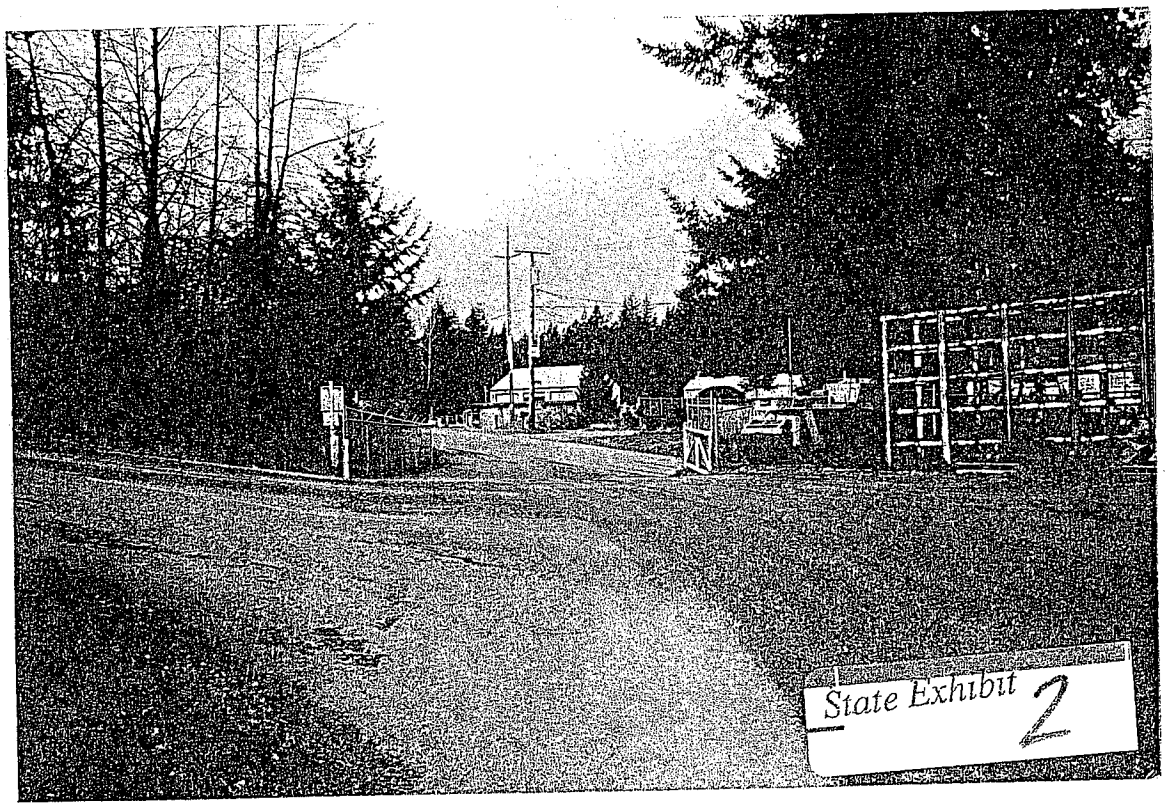


Vanessa M. Lee (WSBA 37611)
WASHINGTON APPELLATE PROJECT-91052
Attorneys for Petitioner

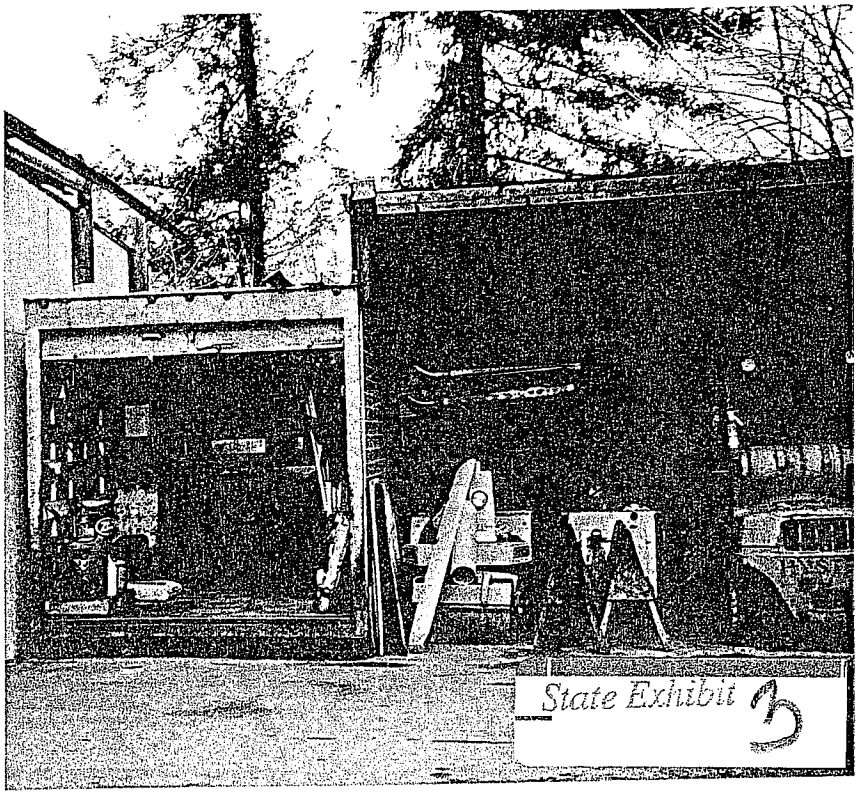
APPENDIX A


State Exhibit
1

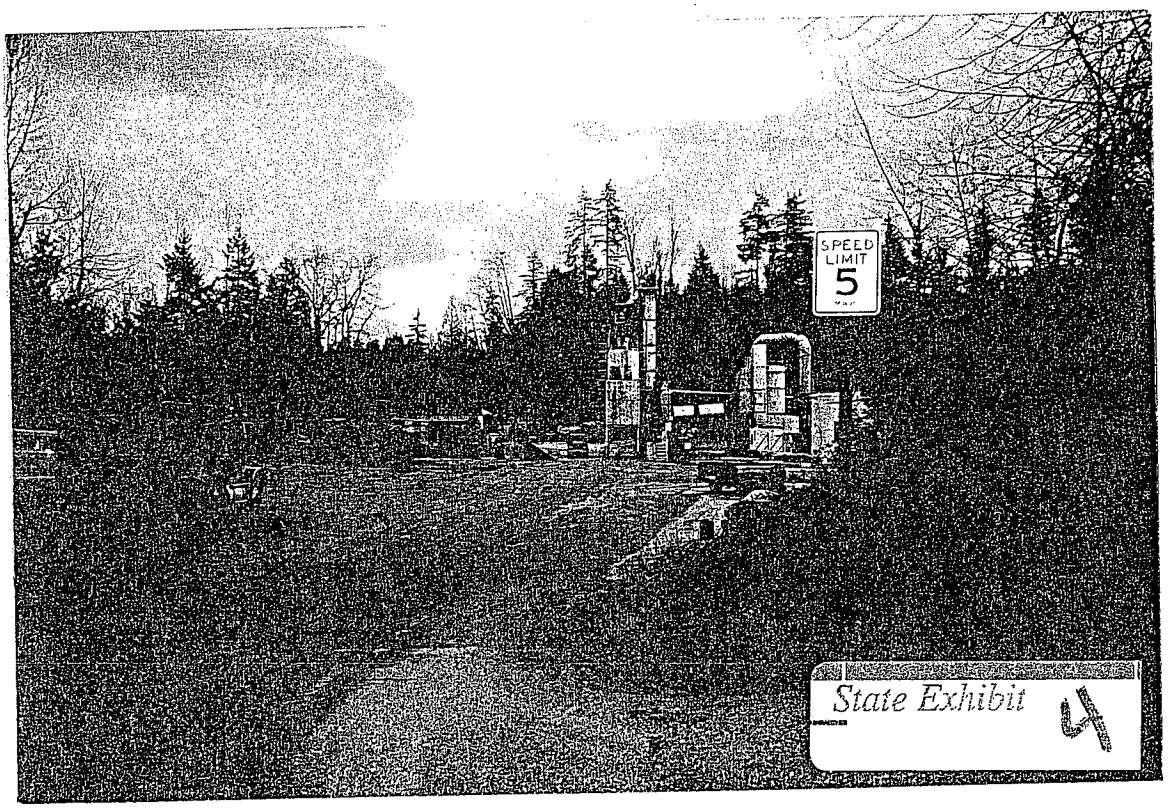
APPENDIX B


State Exhibit 2

APPENDIX C


State Exhibit 3

APPENDIX D


SPEED
LIMIT
5
State Exhibit
4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ROGER ENGEL, Appellant.	)	NO. 58176-7-I

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 12TH DAY OF OCTOBER, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ROGER ENGEL 3606 KENT-KANGLEY RD RAVENSDALE, WA 98051	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF OCTOBER, 2006.

X _____

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the document filed under **Court of Appeals No. 58176-7-I** (for transmittal to the Supreme Court) to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for ☒ respondent **James Whisman - King County Prosecuting Attorney**, ☒ appellant and/or ☐ other party, at the regular office or residence or drop-off box at the prosecutor's office.

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 20, 2007

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

State of Washington, Respondent, v. Roger Dean Engel, Appellant.	)	No. 58176-7-I **DIVISION ONE** UNPUBLISHED OPINION FILED: October 15, 2007

PER CURIAM — Roger Engel was convicted of second degree burglary. He claims the State violated his confrontation rights by presenting hearsay testimony about an out of court identification without an opportunity to cross-examine the declarant. Engel also contends that the State provided insufficient evidence that he entered or remained in a "building" as required for conviction on burglary in the second degree. Finally, he argues the requirement that he submit a deoxyribonucleic acid (DNA) sample for identification violates his rights under the Fourth Amendment to the federal constitution and article I, section 7 of the state constitution. We affirm.

FACTS

After experiencing several thefts, Western Asphalt Company installed a video surveillance system including hidden cameras. Once the system was

installed, William Peterson, the owner, and some of his employees placed some old aluminum tire rims outside a locked shed to lure thieves toward a hidden camera. On January 13, 2005, the company comptroller, Yvonne O'Leary and Peterson reviewed the surveillance video from the previous night and saw footage of two individuals taking the tire rims. Both O'Leary and Peterson testified that the business was closed and the individuals did not have permission to be on the premises. Later in January, Western Asphalt experienced another break-in, at which point O'Leary asked a consultant to copy the video of both events to a CD-ROM and then he gave it to the police.

Detective Johnson was assigned to investigate the case. Upon watching the video, he recognized Gary Shaw as one of the intruders. He also suspected that the second intruder was Roger Engel because of Engel's height and unique moustache and because Engel was one of Shaw's known associates. Detective Johnson asked Deputy Michaels to review the video.

Deputy Michaels testified that he knows both Gary Shaw and Roger Engel and had seen them together. He stated that he had known Roger Engel for fifteen to twenty years and has had numerous interactions with him because they live in the same area. Deputy Michaels was on a first name basis with Engel and had spoken to him approximately fifty or sixty times. When he saw the video, Michaels was able to identify both Shaw and Engel as the intruders. He identified Engel based on his physical characteristics. "I could tell the way [he] walked, his size, also hair coming out." Michael noted the intruder's moustache as a specific characteristic shared with Engel. "More specifically his moustache

when he turned his face at this point. I have known Roger too long, I have never known him not to have a moustache like he has on today." Michaels also identified the intruder by the "way he carried himself" meaning "[h]is walk, the bounce in his step." Finally, he noted the differences in stature between the two intruders. "[T]he size of Roger is a smaller guy in stature. This person wasn't very large compared—you can see the difference between Roger and the other person, Gary Shaw. Gary is about my height, six-foot or so. You can see the difference by size as they walk side by side." Based on these characteristics, Michaels was "[h]undred percent positive" that Engel was one of the intruders.

Gary Shaw testified that he recognized Engel and they had known each other for about a year and a half. Shaw also testified that he had confessed his involvement in the Western Asphalt burglaries to the police, and that he had "scrapped metal" from both legitimate and illegal sources. In his confession to the police, Shaw identified the other participant in the burglaries at Western Asphalt but did not name the person during his testimony.

Finally, Pete Desanto, a paralegal for the King County Prosecutor's Office, testified about a meeting with Shaw the previous day, prior to Shaw's testimony. During the meeting, Desanto showed Shaw the surveillance video. Shaw identified himself and Roger Engel as the men depicted on the video. The defense objected to the questions concerning Shaw's identification of the intruders in the video as a violation of Engel's right to confrontation. The court allowed the questioning. Shaw was never cross-examined about his identification of Engel.

Engel was convicted of second degree burglary. He appeals his conviction alleging violation of his federal and state confrontation rights and insufficiency of the evidence. He also appeals the DNA collection requirement of his sentence.

DISCUSSION

I. Confrontation

Both the United States and Washington State Constitutions guarantee a defendant's right to confront the witnesses against him. See, Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); Sixth Amendment to the United States Constitution; Washington Constitution article I, section 22. The State concedes that allowing Desanto to testify about Shaw's out-of-court identification was error since Engel did not have an opportunity to cross-examine Shaw about the identification. However, the State contends this error was harmless, because of the additional identification evidence offered at trial.

Violations of the confrontation clause are subject to harmless error analysis. State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006). "The correct inquiry is whether, assuming that the damaging potential of the testimony was fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Id. The reviewing court must consider the importance of the witness' testimony, whether the testimony was cumulative, existence of corroborating or contradicting testimony, the extent of cross-examination permitted and the overall strength of the prosecution's case. Id.

(quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

Here, the prosecution presented the jury with several pieces of evidence pointing toward Engel's identity as one of the Western Asphalt intruders. Detective Johnson testified that he recognized Engel in the video. Deputy Michaels, who established his close familiarity with Engel, concluded that he was 100 percent certain that Engel was one of the men in the video. The jury watched the video surveillance and had the opportunity to compare the intruders in the video with both Engel and Shaw inside the courtroom. Finally, Engel walked across the courtroom at the State's request in order to demonstrate the distinctive walk identified by Deputy Michaels. The jury could then compare Engel's walk with that of the intruder captured on the surveillance video. The jury had substantial evidence that Engel was depicted on the video without Desanto's testimony. Any error was harmless beyond a reasonable doubt.

II. "Fenced Area"

The State has the burden of proving all elements of the charged crime beyond a reasonable doubt. Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). Engel argues that the State failed to prove all elements of the crime of second degree burglary because the Western Asphalt yard is not a "building" for the purposes of the burglary statute. When reviewing a challenge to the sufficiency of the evidence, this court determines whether any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). To perform

this inquiry, we draw all reasonable inferences from the evidence in favor of the State and against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). "A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom." State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980).

Conviction for second degree burglary requires proof that the defendant entered or remained unlawfully in a building other than a vehicle or dwelling, with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). Under the burglary statute, "building" includes any "fenced area." RCW 9A.04.110(5). However, the statute does not define "fenced area." "Absent a contrary legislative intent, we give a term that is not defined by statute its ordinary meaning." State v. Wentz, 149 Wn.2d 342, 352, 68 P.3d 282 (2003). Statutory construction is a question of law subject to de novo review. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In interpreting statutes, we must give effect to legislative intent. Id.

Engel contends that the Western Asphalt yard was not a "fenced" area as contemplated by the burglary statute. Evidence was presented to show that the yard was partially fenced with a locked gate. "The front part across the entire front entrance and down a distance is fenced." The fence extends to the stock piles of aggregate and rocks which "varied depending on the time of year, and sometimes they would completely bury a fence." William Peterson estimated that the property was fenced "[t]o the best of our ability" with chain-link fence with barbed wire on the top. On two thirds of the property, "the terrain, probably acts

as a fence more than anything." This terrain is composed of "a lot of banks, high banks, a lot of sloping banks."

Engel claims the combined chain link fence and terrain do not create a "fenced area" because the ordinary meaning of "fenced area" contemplates a property enclosed by a fence. He argues that the State failed to show that the terrain prevented unauthorized access. He also maintains that impassable terrain does not equate to a fence under a common-sense definition of the term.

We have little case law to instruct us whether the terrain and gate together form a "fenced area" under the burglary statute. In Wentz, the court considered a backyard surrounded by a six foot wooden fence with padlocked gates. Id. at 352. The court concluded that "[t]he ordinary meaning of 'fenced area' clearly encompasses the backyard in this case." Id. The court determined that "the State need not show that the fence was erected mainly for the purpose of protecting property within its confines." Id. at 350. Other than disposing of the requirement to prove the protective purposes of a fence, Wentz provides little guidance on the meaning of "fenced area."

However, the Wentz concurrence provides analysis helpful to the determination of whether a property is considered "fenced." The concurrence states "not all fenced areas are, automatically, 'buildings' . . . they must enclose or contain an area (or be so situated as to complete an enclosed or contained area)." Id. at 357 (MADSEN, J., concurring). As an example, "a fence running only along the front of a lot separating it from the street does not create a fenced area constituting a building." Id. at 356. "The fence must serve to circumscribe

an area so as to protect property or people—to close off the space from unwanted intruders." Id. at 357.

Engel argues that the fence here is similar to one that only runs along one side of the lot and does not create a building. However, he ignores that the yard is surrounded by natural barriers and a metal and barbed-wire fence. The burglary statute and case law do not establish that a "fenced area" is created solely by man-made fencing. And the statute does not require an impenetrable barrier. Here, the barbed-wire fence and terrain protects the contents of the yard and signals to would-be intruders that the area is not publicly accessible. These barriers accomplish more than mere separation from a street on one side. The combined fence and terrain isolate and protect the Western Asphalt yard.

This construction of "fenced areas" also corresponds to the public policy behind the burglary statutes. "[T]he underlying theory of the burglary statutes is the protection of persons or property and punishment for invasions that involve a risk of criminal harm or actual harm to persons or property." Id. at 357. To conclude otherwise would limit the protection provided by the burglary statutes. We conclude that combined natural barriers and man-made fencing create a "fenced area" in satisfaction of the "building" element of the second degree burglary requirements. The State produced sufficient evidence to show that the Western Asphalt yard was a "fenced area" beyond a reasonable doubt.

III. DNA Sample

Engel claims that collection of his DNA pursuant to RCW 43.43.754 violates the Fourth Amendment to the federal constitution and article I section 7 of the state constitution. However, State v. Surge recently established that the DNA collection statute "does not invade a recognized private affair under the state constitution, nor is it prohibited under the Fourth Amendment." 160 Wn.2d 65, 69, 156 P.3d 208 (2007). Engel's challenge of the statute has no merit.

We affirm.

FOR THE COURT:

Appelwick, C.J.

Becker, J.

Ellington, J.